

NO. 35518-3-II

Crum

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

In Re the Marriage of

CHERI LOUSE EKLUND
Appellant

and

MICHAEL ALLEN EKLUND
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen Warning, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ISSUES IN REPLY TO RESPONDENT’S BRIEF 1

B. ARGUMENT 1

 1. THE FATHER CANNOT LITIGATE HIS CROSS-ALLEGATIONS AGAINST CHERI NOW. 1

 2. THE FATHER CANNOT CHALLENGE THE TRIAL COURT’S ORDER WHEN HE DID NOT SEEK THE RELIEF BY WAY OF A CROSS-APPEAL. 2

 a) These issues are raised too late. 2

 b) Michael is simply wrong about interpretation of the parenting plan. 5

 3. MULTIPLE “CONTEMPTS” 8

C. MOTION FOR ATTORNEY FEES..... 10

D. CONCLUSION..... 10

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000).....	3
<i>City of Tacoma v. Taxpayers of City of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987).....	4
<i>Public Util. Dist. No. 1 v. Washington Pub. Power Supply Sys.</i> , 104 Wn.2d 353, 705 P.2d 1195 (1985).....	5
<i>Robinson v. Khan</i> , 89 Wn. App. 418, 948 P.2d 1347 (1998).....	3
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971)	9
<i>State v. Acrey</i> , 148 Wn.2d 738, 64 P.3d 594 (2003).....	3
<i>Wolstein v. Yorkshire Ins. Co.</i> , 97 Wn. App. 201, 48 P.2d 924 (1935).....	4

RULES, STATUTES, & OTHER AUTHORITIES

RAP 2.4(a)	3
RAP 3.1.....	3
RCW 26.09.160.....	10

A. ISSUES IN REPLY TO RESPONDENT'S BRIEF.

1. Even if the terms "daycare" or "babysitter," as used in the parenting plan, were ambiguous, the term "parent," as used in the parenting plan, can mean only one thing.

2. The uncontested facts are verities on appeal.

3. Where the father failed to cross-appeal that portion of the trial court's order he lost, i.e., that part of the order that "aggrieved" him, he cannot now challenge that order.

4. The parenting plan does not excuse a parent from complying with the "optional care" requirement for what that parent believes is a beneficial purpose.

5. The aggregation of multiple instances of contempt into one does not harmonize well with the statute. In any case, if the court is to aggregate, it must at least explain why it is doing so, in order that the exercise of discretion be reviewable.

B. ARGUMENT

1. **THE FATHER CANNOT LITIGATE HIS CROSS-ALLEGATIONS AGAINST CHERI NOW.**

Michael Eklund claims "that Cheri has on a few occasions left Nathan with people other than him without asking his permission." Br. Respondent, at 5. Whether true or not, this conduct is irrelevant because it does not excuse Michael's

noncompliance. In any case, these allegations are merely that Michael did not seek relief, but seems now to believe the court should simply accept what he says as proven, though Cheri had no notice that he would make these allegations nor any reason to refute them. This is not the time or place for a trial. If Michael has a complaint, there is a process for adjudicating it.

2. THE FATHER CANNOT CHALLENGE THE TRIAL COURT'S ORDER WHEN HE DID NOT SEEK THE RELIEF BY WAY OF A CROSS-APPEAL.

For the first time, Michael argues that his violations of the "optional care" provision of the parenting plan were made to further "a purpose other than watching the child in his absence." Br. Respondent, at 4. For the first time, he uses this argument to challenge the trial court's order finding him in contempt for not offering Cheri the option of spending time with their son during Michael's extended absences. This argument is too late and it is wrong.

a) These issues are raised too late.

Michael says that he can challenge the trial court's order, despite having filed no cross-appeal, because he does not seek affirmative relief. He seeks only to avoid the consequences of his contemptuous conduct by asking this court to affirm the trial court's

error in failing to order the mandatory make-up time, sanctions, and fees. But it turns logic on its head to claim a right to challenge the correct portion of the trial court's order for the purpose of affirming that portion of it that is wrong. Michael, like everyone else, must play by the rules. And the rules require that he cross-appeal if he wants to challenge that portion of the trial court's order that aggrieves him. RAP 3.1 (aggrieved party may seek review); RAP 2.4(a); ***Robinson v. Khan***, 89 Wn. App. 418, 420, 948 P.2d 1347 (1998). Michael was aggrieved by the court's order interpreting the parenting plan. If he wanted that portion of the order reviewed, he needed to cross-appeal and to challenge the court's findings. **See *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003)** (unchallenged findings are verities on appeal). The authorities he cites do not help him evade these rules.

For example, in ***Amalgamated Transit Union Local 587 v. State***, 142 Wn.2d 183, 202, 11 P.3d 762 (2000), the Respondents prevailed because the trial court found a legislative act unconstitutional in its entirety, "not as a result of a narrow construction of the term tax...." Thus, the Respondents were permitted to offer alternative constructions of the term "tax" to support the trial court's judgment. Nothing like this happened here.

Michael did not prevail on the contempt issue at all, but on the sanctions issue, where the interpretation of “babysitter” is beside the point. ***Amalgamated*** offers him no support for challenging that part of the trial court’s order he lost.

Likewise, in ***City of Tacoma v. Taxpayers of City of Tacoma***, 108 Wn.2d 679, 685, 743 P.2d 793 (1987), the Respondents prevailed in the trial court with their argument that a statute was unconstitutional and, on appeal, merely urged on the court an alternative reason for its unconstitutionality. Here, Michael does not urge an alternative reason to affirm the trial court’s contempt judgment, but makes an argument to undermine that judgment. Again, this case is beside the point.

Finally and similarly, ***Wolstein v. Yorkshire Ins. Co.***, 97 Wn. App. 201, 206-207, 48 P.2d 924 (1935), has no bearing in this case. There, as in ***City of Tacoma*** and ***Amalgamated***, the Respondents urged an alternative reason to affirm that portion of the judgment they won in the trial court. Again, Michael is challenging that portion of the judgment he lost. These cases are inapposite to Michael’s case.

Michael is trying to cross-pollinate when he should have cross-appealed. He is aggrieved by the interpretation of

“babysitter” because it leads to the court’s judgment of contempt. He admits as much when he observes that the statutory consequences “depend on the trial court’s broad and faulty interpretation of ‘babysitter.’” Br. Respondent, at 10. When he challenges that interpretation, and, necessarily, whether he says so or not, the judgment that rests upon it, he is not urging a reason to affirm the court’s failure to impose the mandatory consequences for contempt. His arguments exist on separate tracks, never intersecting. No matter what he calls it, when he asks this Court to re-interpret the parenting plan, he is asking for affirmative relief. Cheri had to appeal to ask this Court to review whether Michael’s wife is a “babysitter” or “parent.” Michael had to cross-appeal if he wanted the some consideration.

b) Michael is simply wrong about interpretation of the parenting plan.

Even if Michael could make this argument now, he is wrong about it. He contends that the trial court interpreted babysitter “very broadly.” Br. Respondent, at 6. He ignores that “babysitter” must be read *in pari materia* with “parent,” as used in the parenting plan. ***Public Util. Dist. No. 1 v. Washington Pub. Power Supply Sys.***, 104 Wn.2d 353, 373, 705 P.2d 1195 (1985). Under the provision,

“the parent” is to notify “the other parent” for optional time with Nathan. Thus, in the parenting plan, you are either a parent or a babysitter. Therefore, the trial court was right to read “babysitter” as it did. If anything, the trial court erred when it narrowed the term, by suggesting that Michael’s new spouse would not be a “babysitter.” See Br. Appellant, at 8-10. Only by interpreting “parent” and “babysitter” as mutually exclusive categories can the optional care provision be effectuated, which, in turn, reinforces the parenting plan’s mandate that Cheri receive “appropriate and liberal residential contact” with the child. CP 53.

Despite the parenting plan’s clarity, Michael wants this Court to read into the “optional care” provision an exception that would operate whenever he could assert that some purpose beyond simply “babysitting” the child would be achieved by leaving him in the care of a non-parent. Br. Respondent, at 4-5. Thus, for purposes of the parenting plan, a non-parent would become the equivalent of a parent whenever Michael believed the relationship between that person and Nathan should be fostered. Presumably, this exception could expand to include anyone, as intimated in Michael’s suggestion that there will be increased occasions for

extended non-parental visits for “non-babysitting purposes.” Br. Respondent, at 9.

Fortunately, words have meaning and the words in the parenting plan cannot be contorted to mean that Michael can override the plan’s provisions when he believes he has a beneficial purpose. For all we know, the provision is in place precisely because of the estrangement between Cheri and some of her family members, an estrangement that, again, for all we know, may be very well justified. It is certainly the family’s own business and irrelevant to the issues in this case.

What is relevant is Michael’s persistent efforts to limit Cheri’s time with Nathan. After all, if he wants to foster relationships between Nathan and other people he can do so during his own, ample time with Nathan. He cannot do so by violating the parenting plan, specifically, here, that portion of the plan that provides for Cheri to have time with Nathan when Michael is not caring for him. Oddly, Michael seems to think that his effort to foster Nathan’s relationship with other relatives somehow trumps the effort to foster Nathan’s relationship with his mother. However, the parenting plan squarely endorses the latter effort and Michael’s apparent effort to restrict Cheri’s time with Nathan, in violation of the plan, should be

soundly rebuffed. Cheri is a “good parent” (CP 53) and entitled to all the time with Nathan provided in the parenting plan. If Michael wants the parenting plan to change, he must do what everyone else is required to do: seek modification. He cannot come in the back door.

3. MULTIPLE “CONTEMPTS”

Michael argues that Cheri invited the court to make only one contempt finding and, thus, cannot now complain that it did. Br. Respondent, 10-11. But the invited error doctrine does not apply here because Cheri did not bear the burden of pointing out to the court that she had made and proven six separate violations of the parenting plan. This is not like proposing a jury instruction. Grammatically, based on resort to the dictionary, it does not appear that contempt has a plural, which comports with common usage. In other words, proper use of the language would not have Cheri asking the court to find Michael in “contempts” for these separate violations, but in “contempt.” Cheri is not responsible for the somewhat clumsy usage that occurs in contempt proceedings. Nor does the grammar dictate the legal issue here. In any case, it is clear that the court itself decided quite deliberately to aggregate the

instances of contempt into one. CP 36. The court was not “invited” by Cheri to make this determination.

Unfortunately, neither the statute nor the case law offer clear guidance on the question presented here. On the one hand, as Cheri argues, the purpose of the parenting plan contempt statute would be well-served by requiring each violation to be considered separately, similar to the incentive inherent in the mandatory sanctions. Parents should not have to rush to court in each instance in order to preserve their remedy, which would be the consequence of Michael’s interpretation and would lead to more, not less, rancor and cost.

At least, if a trial court has discretion to aggregate or disaggregate, the exercise of that discretion requires tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here, the trial court does not explain why it aggregated, and its reason could be as untenable as its failure to impose the mandatory consequences for contempt. How, for example, could the court comply with the mandatory consequences, set forth in the statute, without aggregating the make-up time? Given the structure of the statute, and absent a

compelling reason stated on the record by the court, the separate instances of contempt should be counted separately.

C. MOTION FOR ATTORNEY FEES

Like the mandatory consequences, the imposition of attorney fees is mandatory under the statute: the parent held in contempt “shall” pay to the other parent “all court costs and reasonable attorneys’ fees incurred as a result of the noncompliance, ...” RCW 26.09.160(2)(b)(ii). Accordingly, Cheri should receive her attorney fees and costs on appeal.

D. CONCLUSION

The statute binds the court to impose make-up time, sanctions, and attorney fees and costs. Michael’s effort to expand Cheri’s appeal to include that portion of the court’s judgment that adversely affected him is prohibited by the rules. For the foregoing reasons and those previously stated in the opening brief, Cheri Eklund respectfully asks this Court to reverse the trial court’s order declining to award additional time and attorney fees and declining to impose a civil penalty. She asks the cause be remanded with instructions to comply with the statute in these respects. She asks further that this Court reverse the trial court’s finding that one

contempt occurred, when, in fact, six did. Finally, she asks this Court to award her attorney fees and costs on appeal.

Dated this 27th day of July 2007.

RESPECTFULLY SUBMITTED,



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DECLARATION OF SERVICE
BY: CM
DATE: 07.27.07

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Marriage of:)
) No. 35518-3-II
CHERI LOUISE EKLUND,)
)
) Petitioner,)
)
and)
) DECLARATION
) OF SERVICE
)
MICHAEL ALLEN EKLUND,)
)
) Respondent.)
_____)

Patricia Novotny certifies as follows:

On July 27th, 2007, I served upon the following true and correct copies of the Appellant's Reply Brief and this Declaration, by:
 depositing same with the United States Postal Service, postage paid
 arranging for delivery by legal messenger.

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I certify under penalty of perjury that the foregoing is true and correct.

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